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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A REHEARING.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Fred Toyosaburo Korematsu, demands a rehearing of the within cause upon the following grounds:

I.

CONSEQUENCES OF THE MAJORITY OPINION.

Far better were it that the grim lines of the incredible majority opinion herein never had been written than that they might stand as a judicial precedent justifying not only the summary deprivation of the liberties of the petitioner and other unfortunate citizens but also those of future generations of citizens on the fiction of race and other irrelevant bases. That opinion seems to be founded on the assumption that liberty was our affliction and that our pursuit of a legal right was a painful symptom for which no remedy exists. If it is to stand it will serve but to demonstrate that equality before the law is a mere abstraction and not a fact. It is not an acceptable judicial pronouncement from a tribunal entrusted with the duty of preserving constitutional guaranties. It is the first historic example in which this Court has rejected the concept of the Constitution as a shield and adopted the view that it is a sword that may be wielded without remorse against citizens and classes of citizens. The decision paves the road down which even now a regimented people is being compelled to march unwittingly to state-socialism or state-capitalism. If military control over civilians is to be unlimited we might as well openly declare in favor of a modern police-state patterned after the old Byzantine law or Visigothic code. Citizen Korematsu deserved a better fate at the hands of this, his Court, than he has encountered, wherefore we trouble you to grant a rehearing of his cause, to withdraw the opinion and to

reverse the judgment below. This is the only chance this Court will have to abrogate the dangerous doctrine of inequality announced by the majority opinion. What we require is a reiteration of faith in those fundamental liberties considered inviolate by our Founding Fathers and incorporated in the Constitution they wrote not merely for the benefit of their generation but for this and coming generations of citizens as well.

II.

COURT OVERLOOKED CONFLICT IN ORDERS REQUIRING PETITIONER BOTH TO CONFINE HIMSELF TO AREA AND TO LEAVE THE AREA.

The majority opinion concludes that the order of March 27, 1942 (Public Proclamation No. 4; 7 F.R. 2601), forbidding the petitioner to leave the area and that of May 3, 1942 (Civilian Exclusion Order No. 34), ordering him to leave it through the assembly center route did not contain contradictory commands because the former, by its own express terms, was supplanted by the latter. However, what the Court overlooked was that there were, nevertheless, two contradictory orders outstanding on May 20, 1942, when the information was filed against the petitioner, one forbidding him to leave the area which was not supplanted and one commanding him to leave. The effect of these two orders was neither considered nor passed upon by this Court although the validity of each was in issue.

Public Proclamation No. 3 (7 F.R. 2453) of March 24, 1942, was in full force and effect on May 20, 1942.

It was not supplanted. It remained in full force and effect until January 2, 1945, when it, along with other military orders issued by General DeWitt, was revoked specifically by General H. C. Pratt in Public Proclamation No. 21 issued on December 17, 1944. It commanded the petitioner to confine himself to his home between the hours of 8 P.M. and 6 A.M. and commanded him to stay in and not remove himself beyond a five mile radius from his place of residence in the following language:

> "2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence."

Section 4 thereof makes a violation of section 2 punishable as a misdemeanor under Public Law No. 503. This order does not contain a proviso limiting its effect in time as does Public Proclamation No. 4 of March 27, 1942, which was discussed by the Court. It commanded the petitioner to remain within the five mile circumscribed area and not to leave it. Civilian Exclusion Order No. 34 of May 3, 1942, commanded him to leave it by the avenue of a Civil Control Station situated in Hayward, Alameda County, California, for the Tanforan Assembly Center situated in San Mateo County, California, a distance exceeding 20 miles from his residence, and destined him to final imprisonment in Topaz, Utah, a thousand miles away. The trap was sprung. It was impossible for him to obey both orders. Both were imprisoning orders. The first imprisoned

him within a small geographical area in the vicinity of his home. The second narrowed the corridor through which he was transported to another cell where he was scheduled to remain for an indefinite period. Although each required diametrically opposite acts the petitioner could not escape punishment. A violation of either was made punishable as a misdemeanor by Public Law No. 503. The majority opinion herein admits "a person cannot be convicted for doing the very thing which it is a crime to fail to do". By virtue of that declaration applied to the facts herein we are entitled to have this petition granted and the judgment reversed.

Detention was inherent in program from its inception.

The majority opinion states that had the petitioner left the forbidden area and gone "to an assembly center" it could not say either as a matter of fact or law that his presence in that center would have resulted "in his detention in a relocation center" because some who reported to the assembly centers were not sent to relocation centers but were released upon condition they remain outside the prohibited zones until the military orders were modified or lifted. We are unable to discover the source of the Court's information upon which these strange conclusions appear to have been based and believe the Court to have been misinformed and in error.

Suffice to say that it was not until March 30, 1942, that General DeWitt first announced that an evacuation "was in prospect for practically all Japanese".

See H.R. 2124, page 165, and press release of the Wartime Civil Control Administration, March 30, 1942. Until that time petitioner had no knowledge he might be evacuated. It is significant, however, that the General already had imprisoned the petitioner within a five mile radius from his home by Public Proclamation No. 3 on March 24, 1942. The petitioner had neither notice nor knowledge that the General intended to evacuate him until May 3rd and never had an opportunity to migrate voluntarily. Those who left the forbidden areas prior to March 24, 1942, did so because they suspected they might be evacuated. A majority of them were aliens. The petitioner had no reason to suspect that the General would desire his evacuation. Why should any loyal citizen suspect any such thing? Further, we know of no instance where a person reporting to an assembly center was not detained thereafter in a relocation center. Neither are we aware of any case of any person reporting to an assembly center being released upon condition of remaining outside the prohibited zone until the military orders were lifted. Perhaps the Court's information upon which it based its conclusion is derived from the respondents' brief in the *Endo* case, page 16, stating that General DeWitt's letter of August 11, 1942, delegated authority to the W.R.A. to issue permits for conditional leave to detained citizens. Although we have not seen the General's letter we are informed by the W.R.A. that it contained a delegation of authority to that agency to release volunteer workers from the camps for temporary periods under special permits in order that

they might harvest perishable crops, that is, to dig potatoes, turnips and beets while under surveillance. The workers were not released from the provisions of the exclusion orders, however, for they were retaken to the camps when their work was finished. Consequently, it must be said that as a matter of fact and of law the presence of petitioner in an assembly center was certain to result in and did result in his detention in a relocation center as it was scheduled to do. The issues framed at the trial under a "not guilty" plea involved not only the petitioner's remaining in the area forbidden by Civilian Exclusion Order No. 34 of May 3, 1942, but also the provisions of Public Proclamation No. 3 of March 24, 1942, which commanded him to remain there.

In the light of the facts the reasons recited in the majority opinion for a refusal to pass upon the validity of the whole imprisoning program, including the original confinement of citizens to designated localities, their removal to assembly centers, their deportation and subsequent detention in relocation centers, each a successive phase of one plan of treatment, lose their support. This Court heretofore has decided that such a program is reviewable in its entirety. See *Hirabayashi v. U. S.*, 320 U. S. 81, and *Lovell v. Griffin*, 303 U. S. 444. Must a program be attacked successively in piecemeal fashion so that in three generations we may have a final declaration that it was a mistake and wholly unconstitutional from inception to completion or that it was constitutional in one part and unconstitutional in another? The Court erred in stating

that to pass upon the validity of the whole program would be to go "beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case". The program involved continuous imprisonment for the petitioner from and after March 24, 1942, at various prisons despite the fact that he had been ordered by Public Proclamation No. 3 to remain in the first on peril of punishment under Public Law No. 503. He was ordered to leave the first by Civilian Exclusion Order No. 34 on May 3, 1942, to report to the second prison for final incarceration in a third at Topaz on peril of like punishment. Consequently, all the "momentous issues" mentioned by the Court were tendered by the "not guilty" plea. It will not do to answer petitioner's contention by stating that it will be time enough "to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him". These very orders were certain to be applied to him and were applied to him. The issues were raised by demurrer to the information, by the not guilty plea and were argued in this Court and the Courts below. The serious constitutional questions involved in this barbarous evacuation program are not avoidable in this case. There never will be another test of the issues in the manner mentioned in the majority opinion because such has been rendered impossible. The assembly centers are closed—the relocation centers, by judicial decision in the *Endo* case, are now converted into protectional camps and proposed

legislation threatens to close them by the middle of the year—and the military mass exclusion orders have been revoked. It will not do for this Court to stamp the program with the label of judicial approval by avoidance of the real issues. This case and the *Endo* case precipitated the revocation of the mass exclusion orders and but for these test cases loyal citizens still would be incarcerated and might have waited until doomsday for deliverance from their plight. What we require now is a declaration that loyal citizens cannot be branded criminal for the exercise of constitutional rights. It is the duty of this Court to declare the statute a bill of attainder.

III.

CAUSE SHOULD BE REMANDED TO TRIAL COURT FOR DETERMINATION OF FACTUAL ISSUES TO PREVENT SUBSTITUTION OF FICTION FOR FACT.

The majority opinion concluded, evidently upon the grounds of which it took judicial knowledge when it considered the *Hirabayashi* case, that the evacuation program did not involve "racial prejudice" but was a military imperative dictated by military necessity and was devised to prevent possible acts of espionage and sabotage. Possibilities are always hypothetical. A necessity exists only when we deal with actualities such as threats, overt acts or omissions. The DeWitt report shows that the only matters which he considered were in the nature of vague potentialities and that he was actuated by personal prejudice. If this Court

entertains the belief that there might have been facts undisclosed by him that might be deemed to form a rational basis for his program it would be its duty to remand the cause to the trial Court for a determination of the issues of fact.

At the trial below the respondents did not meet their burden of proof. The rule long has been established that military action taken against a participant in a rebellion or insurrection is justifiable provided the measures taken are "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the prevention of its continuance". It is in such cases that a military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order". Such drastic measures are not conclusively supported by "mere executive fiats" however. See *Sterling v. Constantin*, 287 U. S. 378, and *Moyer v. Peabody*, 212 U. S. 78. The orders violated by the petitioner were mere executive fiats of one of our many generals. They contravened substantial constitutional rights of the petitioner who was proved loyal and not to have been engaged in any criminal or reprehensible act. The taking of judicial knowledge of doubtful matters is not a proper substitute for evidence. It offers no legitimate excuse for the respondent's failure to introduce facts into evidence to sustain its burden of proof on the issue of the military commander's good faith and the factual basis for the necessity claimed to justify the deprivation of fundamental constitutional

rights of the petitioner. If the respondent could have sustained its burden of proof it would have done so at the trial below. If the Court has any doubt that the failure was occasioned by a want of facts supporting the existence of a claimed military necessity justifying the action taken or believes there was a factual basis therefor judicial knowledge ought not to be substituted for concrete evidence and the cause should be remanded for a determination of these issues of fact. It seems to us that the majority opinion says, in effect, that had a general gone so far as to have ordered our federal judges and justices from a forbidden area on the plea that their decisions might have interfered with his plans which arose from an undisclosed military necessity that such action would have been justified in the absence of a declaration of martial law. If such orders would lack constitutionality the orders involved herein lack constitutional sanction.

IV.

INVESTIGATIONS CONDUCTED SUBSEQUENT TO EVACUATION DO NOT CONFIRM BLANKET CHARGE OF DISLOYALTY.

The majority opinion also states that "there were members of the group who retained loyalties to Japan" and that this was confirmed by investigations made "subsequent to the exclusion". The retention of such loyalty on the part of aliens long ineligible to citizenship carries no suggestion that they would have committed any disloyal acts against this nation. If the group contained citizens who preferred loyalty to

Japan it does not follow that they would commit disloyal acts against this nation. The Court also states that subsequent investigation found some five thousand American citizens of Japanese ancestry who "refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan".

The statement of the Court was derived from sources which did not reveal a complete picture of the truth. The frightened internees were asked to fill out a questionnaire. It is to be borne in mind that this questionnaire was required to be filled in by a group of citizens singled out of the whole body of citizens merely because they were of Japanese ancestry. Question No. 28 in DSS-Form 304A asked them to renounce "allegiance or obedience" to the Japanese Emperor. (The same question originally was asked of the aliens ineligible to citizenship but later was revised to ask them to swear "to abide by the laws of the United States and to take no action which would in any way interfere with the war effort of the United States".) The W.R.A. Application For Leave Clearance, Form W.R.A.-126 Rev., contained the same obnoxious Question No. 28. Approximately 5000 of the citizens refused to answer the question at all because such a renunciation involved a false admission of allegiance to Japan. Their failure to answer the question was misinterpreted to indicate that they were attached to Japan.

We draw attention to the fact that this oath was asked of interned citizens who had been denied all the

rights of citizenship without expectancy of relief and who, to all intents and purposes, had been repudiated by their own government. The very oath asked of them carried an admission that they owed allegiance to Japan which allegiance they were to renounce. Renunciation in itself would have involved an admission of attachment to Japan which loyal American citizens viewed as false and could not and would not admit. Would white citizens renounce allegiance to the country of their ancestors when they do not recognize any allegiance except to the United States? Why did not our governmental agencies ask them a simple but fair question, that is, ask them to admit or deny any allegiance or attachment to Japan or any foreign power? The falsity of the charge of wholesale disloyalty is proven by the fact that despite their mistreatment only a few citizens have asked for expatriation and a trifling number of aliens for repatriation to Japan when peace returns. Special legislation recently has been enacted enabling them to exercise this choice. It is significant that since its passage fewer than seventy aliens and citizens have applied for permission to be sent to Japan in the post-war period. These were sent to special alien internment camps during January of this year. In the light of these facts the conclusion of the Court is erroneous and ought to be corrected so that it may not stand in a judicial decision as a permanent brand of disloyalty against innocent citizens.

V.

AUTHORITY TO IMPRISON, EVACUATE AND DETAIN CANNOT BE READ INTO THE STATUTE BY IMPLICATION.

In the *Hirabayashi* case this Court decided that Public Law No. 503 authorized a military commander to establish a curfew on a race discriminating basis. It reached this conclusion because the Secretary of War's letter of March 14, 1942, addressed to the House Committee on Military Affairs (H.R. 2124, p. 168) stated that General DeWitt desired the passage of S. 2352 and H.R. 6758 (Public Law No. 503) to enable the enforcement of "curfews and other restrictions" in military areas. It was on the basis of this indirect notification to Congress that this Court decided that Congress contemplated the establishment of a curfew and, consequently, read into the statute the *implied* intent of Congress to authorize a curfew. However, no like conclusion can be reached concerning the imprisoning program which has been called an evacuation although it involved imprisonment from its inception. The original confinement to small areas, the evacuation and subsequent detention were mere steps in one imprisoning program. Congress does not seem to have been informed that the General intended or desired to institute a generalized imprisonment program. The first notice that any members of Congress had that anyone was to be evacuated was gleaned from the reading of a Washington newspaper report on March 19, 1942, that the General was going to evacuate a limited number of aliens and citizens from the Los Angeles area "early next week". (See 88 Cong. Rec.

2722-26.) The report was erroneous because none were excluded from that area until April 5, 1942, pursuant to Civilian Exclusion Order No. 2. (See H.R. 2124, p. 334.) The congressional committee reports are barren on the subject of evacuation. Consequently, we submit that this Court is unjustified in finding that Congress, either expressly or impliedly, authorized imprisonment, deportation and detention, matters never within its intention or contemplation when it enacted Public Law No. 503. It is significant that on June 18, 1942, S. 2293 providing for the taking into custody of all Japanese was introduced into the Senate and rejected. (88 Cong. Rec. 5317.) On June 22, 1942, the bill was debated and rejected, it being pointed out that the passage of such vicious legislation would constitute "winking at the Constitution". (88 Cong. Rec. 5427-29.)

VI.

THE HIRABAYASHI DECISION IS NOT A PROPER PRECEDENT UPON WHICH TO DETERMINE ISSUES HEREIN.

The majority opinion acknowledges the petitioner challenges the assumptions upon which this Court rested its conclusions in the *Hirabayashi* case. In answer to the challenge the Court relies upon the statement from that case that it could "not reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose numbers and strength could not be precisely and quickly ascertained", a statement made

by the Court long prior to the time General DeWitt's Final Report had been released revealing the error of the conclusion. Nowhere can it be found that Congress ever made any such judgment. Nowhere can it be found that the military authorities ever made any such judgment. Only General DeWitt drew such a conclusion and if his conclusion is to be deemed a judgment it must be considered one divorced from reason, unsupported by fact and founded solely upon prejudice as his letter of February 14, 1942, discloses. (F.R. p. 33.) The Court herein ought not to rely upon the assumptions it made in the *Hirabayashi* case when a rational basis for the program had to be assumed because the General's reasons were treated as military secrets. There are no military secrets that should be kept from the public except matters directly related to the strength and disposition of our forces and the sources and disposition of their supplies. The Final Report itself disputes the assumptions the Court relied upon in the *Hirabayashi* case and proves there was no rational basis for the General's action. This Court ought not to have resorted to the vague and unreliable field of judicial knowledge to support the curfew regulation in the *Hirabayashi* case and ought not now to use that decision as a precedent to determine the issues herein. Such would necessitate a reliance upon fiction for fact to support the General's discriminatory action against citizens.

There was ample time before and during the progress of the evacuation in which the number and strength of disloyal members, if any, could have been

ascertained but no effort was expended in so doing. The Final Report removes any suggestion that the evacuation program had a rational factual basis. It bluntly admits the program was based upon prejudice mingled with suspicion. In actuality there never existed a bona fide military imperative justifying the terrible program. The government has openly admitted on page 57 of its brief herein that the discrimination practiced by the General had no rational basis. The admission reads as follows:

> "In essence, the military judgment that was required in determining upon a program for the evacuation was one with regard to tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than a conclusion based upon objectively ascertainable facts."

Does the Court desire us to believe that the program now can be upheld upon such trifling reasons where the destruction of substantial constitutional rights are involved?

The reasons General DeWitt assigns in justification for his terrible program were collected and assembled in the hodge-podge Final Report long after the program had been carried into execution. They are the products of hindsight and possess the vice of inaccuracy, half-truth and untruth. They prove however that his suspicion and prejudice were erected into a monumental mass of fragile material from which we are to believe a rational basis can be fabricated to justify his colossal military blunder.

The majority opinion also denies that the program was the product of "racial prejudice". General DeWitt's final report, however, demonstrates that it was the product of racial prejudice beyond the shadow of a doubt. (See Final Report, pp. vii-x, 1-39.) His letter of February 14, 1942 (F.R. p. 33), to the Secretary of War reveals that on that date, without evidence of any danger from these people, he nevertheless adopted the arbitrary notion that all Japanese descended persons were "potential" enemies. (F.R. p. 34.) His observers attended the Tolan Committee hearings but neither offered any evidence of disloyalty against these people nor voiced any suspicion of them. His representatives attended the various trials in the Federal District Courts where his orders were challenged but in none of them did they offer any evidence of disloyalty against the defendants or voice any suspicion of them. The respondent is unable to point out a single instance of any act of espionage or sabotage having been committed by any of the excluded citizens or aliens before, during or since the evacuation although such acts could be committed anywhere in the country and the evacuees had and still have opportunities to commit such crimes if so inclined. So have white persons if so inclined. The evacuation was not prompted because of a genuine belief the excluded persons were disloyal but because General DeWitt harbored prejudice against them because of their race.

VII.

NEW AND DANGEROUS PRINCIPLE ESTABLISHED BY MAJORITY OPINION.

In the majority opinion we discover an incredible statement establishing an alien and dangerous principle of law. It reads as follows:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can."

Apparently, the fiction of race is given a validity it never possessed and does not merit. There are no races in the United States. Mankind is a race but it is not divisible except into nationalities. In this country all citizens possess but one nationality and that nationality is American. If citizens are divisible into groups it can only be on such irrelevancies as size, configuration, pigmentation or situation, none of which justifies discrimination. The curtailment of constitutional rights on a discriminatory basis is not only immediately suspect but is an outright violation of the Constitution.

If discrimination practiced under the color of governmental authority is merely to be suspect and subject to the most rigid scrutiny we are confronted with a strange principle which for the first time crops into juridical thought. Such a principle leaves it to the

individual citizen to guess whether his act or omission is lawful or unlawful and his guess is made dependent upon what this Court long thereafter, on appeal, may decide his rights to be after "the most rigid scrutiny", the plain language of the Constitution and prior judicial interpretation of its provisions to the contrary notwithstanding. This means simply that the Court may decide momentous issues on the caprice of the moment and contrary to precedent. All is left to surmise and to obscurity. The citizen must act at his own peril. How then is anyone to know what his rights are? Must every whimsical command of a military commander be obeyed by civilians and the matter be left to a Court's "most rigid scrutiny" before it can be determined whether it be valid or not? How is a civilian to learn what military orders he must obey and what he may ignore? What is become of civil rights under the Constitution that the citizen must play the part of an anvil to the administration's hammer? A power invoked in wartime that can be rationalized by the Court so as to be asserted to conform to the Constitution can be utilized at all times and find justification on the ground of public emergency, a vagrant term comprehending various forms of crises, political and economic, from one or the other of which we never are free. While expressly denouncing racial prejudice the majority opinion nevertheless upholds its application as though it viewed the affected citizens not as citizens but as part of the landscape. It also sacrifices consistency in declaring that a loyal citizen not charged with crime can be imprisoned

whereas the *Endo* decision declares such a citizen cannot be imprisoned.

It does this tribunal little good and the public a great measure of injury to state that Korematsu, a loyal citizen, was not imprisoned and branded criminal because of his race. On December 17, 1944, General H. C. Pratt, by Public Proclamation No. 21, revoked the mass exclusion orders issued by his predecessor, the revocation taking effect as at January 2, 1945, and obviously being a policy dictated by the War Department. On the same date General Pratt issued a press release admitting his predecessor had based the exclusion on racial grounds, stating therein "it is apparent that the logical and proper course is to terminate mass exclusion based solely on ancestry". The revocation was announced on Sunday the day before this Court handed down its opinions in this and the *Endo* case. On the surface the sudden revocation, timed so perfectly, had the appearance of a face-saving procedure as though it had been adopted because of an anticipated condemnation of the program in the two cases. However, the injury is not undone. Although mass exclusion has been terminated Public Proclamation No. 21 informs us that a system of individual exclusion will act as its substitute. It is by this adroit method that the military authorities may continue to exclude citizens at their whim in the absence of a genuine military necessity for such exclusion. In such circumstances, under the majority opinion herein, a private citizen will have no opportunity to question the validity of the individual exclusion order and no

power to escape its effects. The Court's opinion in the *Endo* case would not be controlling in such an instance because the military authorities arbitrarily might declare the individual disloyal and hold him indefinitely without a hearing on the question of his loyalty. It is little comfort the majority opinions in this and the *Endo* case offer the individual who may incur the enmity or suspicion of a military commander.

VIII.

A CONCENTRATION CAMP IS A CONCENTRATION CAMP.

It is with amazement that we read in the majority opinion that it is unjustifiable to call the assembly and relocation centers by their true names. It is shocking to learn that it is now become distasteful to term a concentration camp a concentration camp. We neither solicited nor deserved the admonition—that truth has become unmentionable. The citizens who were ruthlessly ordered from their homes and thrown into huts and hovels in camps where they have been confined for years, mistreated and forgotten, know them for what they really are. Whatever these camps may be called they are exactly what they were designed to be, what they are conducted as and what they are—concentration camps. The American public is not a kindergarten that it will accept the notion that these shameful prisons are sanctuaries. The narration of a few incidents may present them in their true light.

On December 6, 1942, two young evacuees were shot dead and nine wounded by military police at Manzanar for congregating in a crowd. A few newspapers which value rumors higher than the truth because of what has been termed "story-value" were quick to spread the ugly but false report that the incident had been provoked by disloyal internees. There was nothing sinister in the assemblage however. Its purpose was petitioning the W.R.A. officials for redress of wrongs, a matter we have been taught was guaranteed by the First Amendment. (See W.R.A. Quarterly Report, Oct. 1 to Dec. 31, 1942, pp. 37-38.) Evidently the right to intern loyal citizens also carries the right to shoot them with impunity. The fact that the camp was converted into the appearance of an abattoir impresses us as one of the characteristics of a typical concentration camp.

On November 4, 1943, eighteen evacuees in the Tule Lake Center were treated for injuries received at the hands of special police and an army detachment stationed there arising out of strike-breaking activities of a few internees. (See W.R.A. Semi-Annual Report, July 1 to Dec. 31, 1943, p. 20.) It has been charged that Caucasian internal security police at the camp brutally beat several helpless internees into insensibility without cause. (See American Civil Liberties Union-News, San Francisco, August, 1944.) The authorities in charge are reluctant to divulge the results of their investigations into the cause of this brutality. Are we to believe that because the injured were hospitalized at government expense that the camp was a

sanctuary and that the bludgeoning of helpless citizens was justified because the medical staff needed patients upon whom to exercise their medical skill? Thereafter, several hundred internees were dragged from the shacks that housed them and held incommunicado in a special prison within the camp boundaries known as "The Stockade", the detention varying from a few days to in excess of eleven months. No complaints were lodged against the prisoners and no hearings were granted them. The stockade is mentioned in the W.R.A. reports merely as "an isolation area". Barbarism has its own peculiar nomenclature.

Although the interned citizens of military age are not free agents it has been the policy of the administration to induct them into the Army. Those who by reason of their imprisonment and impoverishment have refused to report for induction have been indicted for a violation of the draft law.* The administration's act in imprisoning them raises the presumption that it suspects them of disloyalty. It inducts them into the Army from imprisonment and thereby admits their loyalty. The inconsistency of its position is susceptible of no explanation except caprice. It falls into the same class of arbitrariness as General DeWitt's orders prohibiting soldiers of Japanese ancestry from enter-

*The practice of indicting imprisoned Nisei for refusing to report for induction has been condemned as a denial of due process of law. See *U.S. v. Kuwabara*, 56 Fed. Supp. 716, under which District Judge Goodman, releasing 26 Nisei, declared it "to be shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion."

ing the forbidden areas set up by him. Evidently the administration shares the view with General DeWitt that a person admittedly loyal in one part of the country is disloyal in another, the measure of a loyal citizen being his ancestral line. The fact that an administrative branch of government ignored traditional legal rights and indicted these Nisei under such circumstances indicates an interest in persecution and a disinterest in the administration of justice. Persecution is an attribute of the concentration camp.

We entertain the view that a concentration camp is one in which innocent citizens are imprisoned without charge of crime being lodged against them and held without a hearing of any sort before a competent tribunal and where they are subjected to abusive treatment. These camps meet this description. No intelligent effort was made to ascertain whether there were any spies or saboteurs in their midst. The F.B.I. looked elsewhere, knowing these camps harbored none. If these camps contained any persons who were not friendly to this nation it is to be remembered that there existed no reliable evidence or reasonable suspicion that any of them would have raised a hand against this nation. It is no more likely that any of them would have done so than that any other group of citizens white or yellow would have done so. The proclivities of the average white citizen do not differ from those of the average yellow.

While the evacuation of these citizens startled a sober thinking part of our populace a few notorious agitators seeking the doubtful benefits of cheap but

sensational publicity protested not only the miserable shelter given these unfortunates but also begrudged them the very food they consumed and declared they were being coddled by the administration.

CONCLUSION.

No other military commander in our history ever perpetrated such an outrage or exerted such a mischievous power over the lives and destinies of American citizens as General DeWitt. We do not believe that the intelligence of one military commander is to be the measuring rod by which a military necessity is to be determined when the rights of some 130,000 civilians are involved. If Congress could vest such power in him it could lodge all power in the executive. In such an event the Constitution would become a nullity and our Courts would exist by sufferance and be permitted to act only as apologists for dictatorial action while the populace winced under the lash of tyranny. Neither the congressional nor the judicial mantle has yet grown so threadbare that our representatives and judicial officers must wear the livery of the executive instead of that of the nation.

It was Oswald Spengler who observed that the advent of Caesarism brings "that kind of government which, irrespective of any constitutional formulation that it may have, is in its inward self a return to thorough formlessness". (Decline of the West, vol. 2, p. 431.) Rationalizing the Constitution to justify an invasion not only of its express provisions but of its

very spirit distorts it into formlessness and spells its doom. It is a poor patching of fig leaves to conceal the naked Truth. The majority opinion injects into the Constitution the foreign germs of its decay. It needs but one additional decision of like import to write its final epitaph and the tribunal entrusted with its guardianship will have become its destroyer. The Founding Fathers never intended such a power to be exercised by this Court and the nation would not approve it were it aware of its real significance.

For the foregoing reasons we demand this petition be granted and that upon a rehearing of the cause the judgment be reversed that the mission for which this Court was ordained be fulfilled and that justice be done the petitioner.

Dated, San Francisco, California,
February 5, 1945.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
February 5, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.

UPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1944.

Fred Toyosaburo Korematsu, Petitioner, *vs.* The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 18, 1944.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent was convicted in a federal district court for remaining in San Leandro, California, a "Military Area", contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,[1] and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restric-

[1] 140 F. 2d (C. C. A. 9).

tions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi* v. *United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True,

exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the con-

tention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.[2]

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547; *Block* v. *Hirsh*, 256 U. S. 135, 154-5. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U. S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands. There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed. Reg. 2601. That "future order", the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons

[2] Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, 608 726; Final Report, Japanese Evacuation from the West Coast, 1942, 309-327;

Part II, — e on Immigration and presentatives, 78th Cong., other bills to expatriate ited States, pp. 37-42, 49-58;

of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 21 and May 3rd orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers", in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did re-

port to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger* v. *United States*, 284 U. S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

The *Endo* case, decided today, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via

an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area

No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i. e.*, by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Hirabayashi* v. *United States*, 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully". *Hirabayashi* v. *United States, supra* at 93. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of

; and see Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 426.

"The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations", Hamilton v. Kentucky Distilleries Co.

the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447; 155 U. S. 3, and *Monongahela Bridge* v. *United States*, 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not mine.

Mr. Justice ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Hirabayashi* v. *United States*, 320 U. S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066,[1] which, after stating the reason for issuing the order as "protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities", provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent, "from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions", the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,[2] which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion . . . and, in connection therewith, is subject to espionage and acts of sabotage". It states that "as a matter of military necessity" certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that "Such persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

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[1] 7 Fed. Reg. 1407.

[2] 7 Fed. Reg. 2320.

On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted[3] that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander" shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi* v. *United States*, *supra*.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4,[4] the General recited that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1 to restrict and regulate such migration"; and ordered that, as of March 29, 1942, "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."[5]

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive

[3] 56 Stat. 173.

[4] 7 Fed. Reg. 2601.

[5] The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

Order No. 9066 and the Act of Congress meant what they said: to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34[6] providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters" . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document—and, in the light of the above recitation, I think it is not—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the

[6] 7 Fed. Reg. 3967.

area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102[7] establishing the War Relocation Authority under which, so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Endo* v. *United States* (No. 70 of this Term) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case.[8] The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a con-

[7] 7 Fed. Reg. 2165.

[8] My agreement would depend on the definition and application of the terms "temporary" and "emergency". No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained at the date of the restraint out of which the litigation arose. Cf. Chastleton Corp. v. Sinclair, 264 U. S. 543.

flagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it. But the facts above recited, and those set forth in *Endo* v. *United States, supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the *Endo* case, *supra*. The answer, of course, is that

where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

Mr. Justice MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that

has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, 287 U. S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States* v. *Russell*, 13 Wall. 623, 627-8; *Mitchell* v. *Harmony*, 13 How. 115, 134-5; *Raymond* v. *Thomas*, 91 U. S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearing, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the danger of invasion, sabotage and espionage. But the exclusion, either ten

porarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.[1] In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast.[2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,[3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by ber-

[1] Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. De Witt. This report is dated June 5, 1943, but was not made public until January, 1944.

[2] Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 239-40 (78th Cong., 1st Sess.):

"I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

[3] The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

tain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[4] They are claimed to be given to "emperor worshipping ceremonies"[5] and to "dual citizenship."[6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,[7] together with facts as to certain persons being educated and residing at length in Japan.[8] It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."[9] The need for protective

[4] Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

[5] Final Report, pp. 10-11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

[6] Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L. Q. 414, 447-8, and authorities there cited; McWilliams, Prejudice, 123-4 (1944).

[7] Final Report, pp. 12-13. We have had various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121-3 (1944).

[8] Final Report, pp. 13-15. Such persons constitute a very small part of the entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.

[9] Final Report, p. 10; see also pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited

custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands."[10] Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,[11] as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.[12] A military judgment

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occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, Prejudice, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

[10] Final Report, pp. 8-9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1-2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145-7. In this instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, What About Our Japanese Americans? Public Affairs Pamphlets, No. 91, p. 8 (1944).

[11] Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

[12] Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, Prejudice, 126-8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss

based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.[13]

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese-Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese-Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence."[14] Yet nearly four months elapsed

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them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 Sat. Eve. Post 24, 66 (May 9, 1942).

[13] See notes 4-12, *supra*.

[14] Final Report, p. vii; see also p. 18.

after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,[15] a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.[16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way

[15] The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese-Americans could escape the suspicion of sabotage.

[16] During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer. Journ. of Int. Law 443, 444-46; House Report No. 2124 (77th Cong., 2d Sess.), 280-1.

by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here an

attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If we do

Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, unfested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what

Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[1] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi* v. *United States*, 320 U. S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said: "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew*." 320 U. S. at 101. "We decide only the issue as we have defined it—we decide only that the *curfew order* as applied, and at the time it was applied, was within the boundaries of the war power." 320 U. S. at 102. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order*." 320 U. S. at 105. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if

[1] Nature of the Judicial Process, p. 51.

that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.